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No. 99-1408

In the Supreme Court of the United States

GAIL ATWATER, ET AL., PETITIONERS

v.

CITY OF LAGO VISTA, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENTS

SETH P. WAXMAN
Solicitor General
Counsel of Record
JAMES K. ROBINSON
Assistant Attorney General
MICHAEL R. DREEBEN
Deputy Solicitor General
PATRICIA A. MILLETT
Assistant to the Solicitor General
THOMAS M. GANNON
Attorney
Department of Justice
Washington, D. C. 20530-0001
(202) 514-2217

QUESTION PRESENTED

Whether the reasonableness clause of the Fourth Amendment prohibits officers, who have probable cause to believe that a crime has been committed, from arresting the suspect because the crime involves a traffic offense that is punishable only by a fine.

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INTEREST OF THE UNITED STATES

This case presents the question under the Fourth Amendment's reasonableness clause whether police officers may make warrantless arrests for misdemeanor offenses that are punishable only by a fine or whether the arrest authority is limited to misdemeanors that are punishable by imprisonment or that cause a breach of the peace. There are approximately 85 federal criminal offenses that are punishable only by a fine. See App. A, *infra*. Federal law enforcement officers are authorized by statute to make warrantless arrests for any misdemeanors committed in their presence, without any limitation to violations punishable by more than a fine or to those that constitute a breach of the peace. See, *e.g.*, 16 U.S.C. 460*l*-6a(e) (authorizing arrest without a warrant for fine-only offenses committed in national parks or federally administered recreation sites or facilities); 18 U.S.C. 3052, 3053. In addition, the United States frequently prosecutes cases based on evidence that comes to light as the result of arrests by state or local authorities enforcing their own laws under their own policies. The United States

therefore has a significant interest in the resolution of this case.

STATEMENT

1. Texas has made it a criminal offense for front-seat passengers in a passenger vehicle to fail to wear safety belts if the vehicle is equipped with such belts. Tex. Transp. Code Ann. § 545.413(a) (West 1999 & Supp. 2000). Texas law also criminalizes the failure of a driver to secure with a safety belt any child between the ages of 4 and 15 who is riding in the front seat of the vehicle. *Id.* § 545.413(b). Violation of the law is punishable by a fine of not less than $25 or more than $50.[1] Texas law authorizes, but does not require, law enforcement officers to issue citations in lieu of arrest for violations of the seatbelt law. *Id.* §§ 543.003-543.005.

2. In March 1997, petitioner Gail Atwater was driving with her two children in the family's pickup truck. Pet. App. 51a. Petitioner's three-year-old son and five-year-old daughter accompanied her in the front seat. *Ibid.*; J.A. 20.[2] Petitioner was not wearing a seatbelt, nor had she put seatbelts on her children. Respondent Bart Turek, at that time a City of Lago Vista police officer, witnessed the seatbelt violations and stopped petitioner's vehicle. According to the allegations of the complaint, which must be accepted as true at this stage, respondent Turek yelled at petitioner as he approached the vehicle that "[w]e've met before" and

[1] Federal law similarly criminalizes the failure of an operator and all passengers to wear safety belts in any passenger car operated on federal parkways or federal parkland. 36 C.F.R. 4.15. Failure to comply is punishable by a fine of up to $5000 or six months' imprisonment or both. 36 C.F.R. 1.3(a); 18 U.S.C. 3571(b)(7).

[2] Although the district court described the children as "seated," petitioner Atwater's affidavit indicates that both children were standing on their seats, C.A. App. 702, and the complaint is not inconsistent with the affidavit. J.A. 20. The police report indicates that petitioner's son was "standing in the passenger side of the truck and leaning against the dashboard." C.A. App. 420.

"[y]ou're going to jail." Pet. App. 51a-52a; J.A. 20.[3] Respondent then called for back-up and asked petitioner for her license and insurance information. Pet. App. 52a. Petitioner responded that she did not have them because her purse had been stolen the day before. Respondent stated that he had "heard that story two-hundred times" from stopped motorists. J.A. 21; see also Pet. App. 52a. When petitioner asked to take her children to a friend's house nearby, respondent replied, "[y]ou're not going anywhere." Pet. App. 52a; J.A. 21. Petitioner's friend then arrived and took the children to her home. *Ibid.* After the children left, respondent Turek handcuffed Atwater and took her to the local jail, where she spent approximately one hour being processed and having bail set. Pet. App. 2a, 52a; C.A. App. 423. In addition, petitioner's car was impounded. Pet. App. 52a. The arrest report charged petitioner with driving without a seatbelt, failing to restrain her children in seatbelts, driving without a license, and failing to provide proof of insurance. *Id.* at 2a.

3. Petitioner and her husband filed suit under 42 U.S.C. 1983 against respondent Turek, the Chief of Police, and the City of Lago Vista. Pet. App. 3a. The complaint alleges denials of petitioner's constitutional rights under the Fourth and Fifth Amendments and violations of state law, and seeks compensatory, special, and exemplary damages. J.A. 22-40.

The district court granted summary judgment for the respondents (Pet. App. 50a-63a) on the ground that petitioners' claims were "meritless," *id.* at 51a, in light of petitioner Atwater's admission that her conduct violated the criminal law and her failure to allege that she "was harmed or detained in any way inconsistent with the law," *id.* at 56a-57a.

[3] Respondent Turek had previously stopped petitioner for what he perceived to be a seatbelt violation, but then learned that, although petitioner's son was seated up on the vehicle's armrest, he was wearing a seatbelt. Pet. App. 30a.

4. A panel of the court of appeals reversed. Pet. App. 28a-49a. The court held that petitioner's claim that respondent Turek yelled at her and arrested her for the seatbelt violations properly alleged an unreasonable seizure under the Fourth Amendment. *Id.* at 33a. The panel also held that respondent Turek was not entitled to qualified immunity because "Supreme Court precedent clearly established" that "an arrest for a first-time seat belt offense is indeed an extreme practice" subject to a "balancing analysis to determine the reasonableness of the police activity." *Id.* at 44a.[4]

5. The en banc court of appeals reversed. Pet. App. 1a-27a. Relying on this Court's decision in *Whren* v. *United States*, 517 U.S. 806 (1996) (Pet. App. 4a), the majority held that an arrest based on probable cause is reasonable under the Fourth Amendment except in those "rare" instances where the arrest is "conducted in an extraordinary manner" that is "unusually harmful to an individual's privacy or even physical interests," *ibid.*, such as the use of deadly force, physical penetration of the body, or entry of the home, *id.* at 6a. Because "[n]either party disputes that Officer Turek had probable cause to arrest [petitioner]" and because "there is no evidence in the record that Officer Turek conducted the arrest in an 'extraordinary manner, unusually harmful'" to petitioner's privacy interests, the court held that the arrest was reasonable under the Fourth Amendment. *Id.* at 6a, 7a.

Judge Reynaldo Garza dissented on the ground that the normal practice is to issue a citation for seatbelt offenses and no reason was given for arresting petitioner. Pet. App. 8a-11a. Judge Wiener dissented on the ground that, in his view, "[b]efore a police officer can constitutionally place an individual under full custodial arrest, even with probable cause, the officer must have a plausible, articulable reason for effecting such an intrusion," *id.* at 20a, and that, in the absence

[4] The panel also reinstated the claims against the City, but it affirmed dismissal of the claims against the Chief of Police. Pet. App. 49a.

of such a reason, the arrest constitutes the infliction of "punishment" on the individual, *id.* at 18a. Judge Dennis dissented on the ground that the Fourth Amendment incorporates the common-law prohibition on arrests for misdemeanors that do not involve a breach of the peace. *Id.* at 20a-27a.

SUMMARY OF ARGUMENT

Petitioner's arrest for violation of a state criminal law satisfied the requirements of the Fourth Amendment. The arrest was supported by probable cause to believe that petitioner had violated the criminal law; indeed, she has never denied the violations nor disputed the existence of probable cause. Because probable cause existed and the seizure was not effected in an extraordinary or unusual manner, the arrest was reasonable within the meaning of the Fourth Amendment.

1. There is no basis for concluding that the Fourth Amendment permits a warrantless arrest for a misdemeanor only if the violation involves a breach of the peace. The common law expressly recognized that the arrest authority of police could be expanded by statute to include arrests like the one at issue in this case, and the longstanding practice of the federal government and every State confirms that understanding. Moreover, the phrase "breach of the peace" itself lacked an established meaning at common law, such that, even if it were incorporated into the Fourth Amendment, it would not restrict arrests in the manner advocated by petitioner. Indeed, this Court has recognized that the congressional immunity from arrest for a "breach of the peace" found in Article I, Section 6 of the Constitution embraces all violations of the criminal law. Finally, the reasonableness of an arrest under the Fourth Amendment should not turn on malleable and diverse legislative classifications of crimes as misdemeanors or felonies, or on variable judicial definitions of "breach of the peace."

2. The Fourth Amendment permits a custodial arrest even though the law at issue is punishable only by a fine. The common law did not foreclose arrests for fine-only offenses, and established practice permits them. Furthermore, the propriety of an officer's decision to arrest based on probable cause—and his potential liability for money damages—should not vary based on the punishment that ultimately ensues weeks, months, or years later. And there is no basis for concluding that a jurisdiction's decision to penalize a violation by a sanction other than imprisonment means that the government lacks a strong interest in effective enforcement of that law. Where probable cause exists, a jurisdiction's decision to enforce the criminal law through a custodial arrest is not constitutionally suspect simply because a less intrusive enforcement method may arguably be available.

ARGUMENT

The Fourth Amendment, made applicable to the States through the Fourteenth Amendment, *Payton* v. *New York*, 445 U.S. 573, 576 (1980), provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const. Amend. IV. Outside the home, the Fourth Amendment does not require a warrant in order to justify an arrest based on probable cause. *Payton*, 445 U.S. at 590-591; *Gerstein* v. *Pugh*, 420 U.S. 103, 113 (1975). Rather, a police officer's "on-the-scene assessment of probable cause provides legal justification for arresting a person suspected of crime, and for a brief period of detention to take the administrative steps incident to arrest." *Id.* at 113-114.

This Court has never invalidated a routine arrest for a criminal offense based on probable cause. To the contrary, the Court recently reaffirmed that the "result of [the Fourth Amendment's reasonableness inquiry] is not in doubt where the search or seizure is based upon probable cause." *Whren* v. *United States*, 517 U.S. 806, 817 (1996); see also *Brown* v. *Texas*, 443 U.S. 47, 50 (1979) (balancing of public and individual's interests is reserved for "seizures that are less intrusive than a traditional arrest"); *Dunaway* v. *New York*, 442 U.S. 200, 208 (1979) (the "long-prevailing standard[]" of probable cause "embodie[s] the best compromise that has been found for accommodating [the] often opposing interests in safeguard[ing] citizens from rash and unreasonable interferences with privacy and in seek[ing] to give fair leeway for enforcing the law in the community's protection. The standard of probable cause thus represent[s] the accumulated wisdom of precedent and experience as to the minimum justification necessary to make the kind of intrusion involved in an arrest 'reasonable' under the Fourth Amendment.") (internal quotation marks and citation omitted).

Indeed, the only cases in which this Court has applied a balancing analysis to arrests based on probable cause have been when the search or seizure was effectuated in an "extraordinary manner, unusually harmful to an individual's privacy or even physical interests—such as, for example, seizure by means of deadly force, unannounced entry into a home, entry into a home without a warrant, or physical penetration of the body." *Whren*, 517 U.S. at 818 (citations omitted); see also *Dunaway*, 442 U.S. at 208 (probable cause standard "applie[s] to all arrests, without the need to balance the interests and circumstances involved in particular situations").

If the allegations of the complaint are subsequently shown to be true, there would be little question that respondent Turek behaved in an inappropriate and unprofessional manner. But the arrest of Gail Atwater was nevertheless per-

missible under the Fourth Amendment. Petitioners' and their amici's effort to discard the long-established probable cause standard for arrests finds no basis in the Fourth Amendment, this Court's precedents, or the practicalities of law enforcement.

I. WARRANTLESS MISDEMEANOR ARRESTS BASED ON PROBABLE CAUSE ARE REASONABLE UNDER THE FOURTH AMENDMENT REGARDLESS OF WHETHER THE OFFENSE CONSTITUTES A "BREACH OF THE PEACE"

A. No Source Of Law Supports Imposing On The Fourth Amendment A "Breach Of The Peace" Requirement For Misdemeanor Arrests

Petitioners (Br. 13-20) and their amici (Cato Inst. Br. 3-7; NACDL Br. 15-17; ACLU Br. 20-21) argue that the arrest of petitioner Atwater was unreasonable because the common law generally prohibited warrantless arrests for misdemeanors that did not involve breaches of the peace. It is true that the common law rule for warrantless misdemeanor arrests "[was] *sometimes* expressed" as limited to "when a breach of the peace has been committed in [the officer's] presence or there is reasonable ground for supposing that a breach of peace is about to be committed or renewed in his presence." *Carroll* v. *United States*, 267 U.S. 132, 157 (1925) (quoting 9 *Halsbury's Laws of England* (*Halsbury*) pt. III, § 612, at 299 (1st ed. 1909)) (emphasis added). But that statement of the common law does not suggest that a parallel rule should exist under the Fourth Amendment. The common law itself, this Court's cases, and a pattern of arrest authorization statutes make clear that Congress and the States may expand upon the common law arrest authority.

1. The common law specifically recognized that an officer's arrest authority could be expanded by statute. 10 *Halsbury* § 632, at 342 (3d ed. 1955) ("An arrest without a warrant may be under a power conferred by common law or by statute."). Statutorily conferred arrest authority was not confined to breaches of the peace. For example, night watchmen could "arrest *all* offenders, and particularly night-walkers, and commit them to custody till the morning." 4 W. Blackstone, *Commentaries on the Laws of England* 289 (1769) (emphasis added); see also 2 W. Hawkins, *A Treatise of Pleas of the Crown* ch. 13, preface & § 5, at 79-80 (1795) (authority of night watchmen to arrest "any Stranger * * * until Morning," without "Process from some Court of Record"). Under the Pedlar's Act of 1871, a police officer could arrest a pedlar who "refuses to show his certificate or has no certificate," 10 *Halsbury* § 641, at 348 n.s, and under the Hawkers Act of 1888, a "peace officer may arrest a person found hawking without a license or not producing a licence on demand," *id.* § 642, at 350 n.f. Officers could also arrest without a warrant "in connexion with the protection of * * * musical copyright." *Id.* § 642, at 350.

Accordingly, "it is generally recognized today that the common law authority to arrest without a warrant in misdemeanor cases may be enlarged by statute." *Welsh* v. *Wisconsin*, 466 U.S. 740, 756 (1984) (White, J., dissenting) (internal quotation marks omitted); H. Wilgus, *Arrest Without A Warrant*, 22 Mich. L. Rev. 541, 550 (1923-1924) (Wilgus) ("The states may, by statute, enlarge the common law right to arrest without a warrant, and have quite generally done so or authorized municipalities to do so, as for example, an officer may be authorized by statute or ordinance to arrest without a warrant for various misdemeanors and violations of ordinances, other than breaches of the peace, if committed in his presence.") (citing cases) (footnotes omitted)); *id.* at 705-706.[5]

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[5] See also *Oleson* v. *Pincock*, 251 P. 23, 25 (Utah 1926); *Conrad* v. *Lengel*, 144 N.E. 278, 278 (Ohio 1924); *Burroughs* v. *Eastman*, 59 N.W. 817, 819-820 (Mich. 1894); *White* v. *Kent*, 11 Ohio St. 550, 554 (1860); 10

2. This Court's descriptions of the common law rule for misdemeanor arrests, moreover, have generally omitted the breach of the peace limitation and have focused, instead, on the requirement that the misdemeanor be committed in the officer's presence.[6] See, *e.g.*, *Payton*, 445 U.S. at 590 n.30 ("The cases construing the Fourth Amendment thus reflect the ancient common-law rule that a peace officer was permitted to arrest without a warrant for a misdemeanor or felony committed in his presence."); *United States* v. *Watson*, 423 U.S. 411, 418 (1976) (same).[7]

Likewise, most lower courts that have addressed the issue have held that the Fourth Amendment does not bar warrantless misdemeanor arrests, regardless of whether the offense constitutes a breach of the peace or is punishable only by fine.[8] The common law "breach of the peace" limitation that petitioners and their amici suggest should be incorporated into the Fourth Amendment thus has not been

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Halsbury §§ 641, 642, at 347-351 (discussing statutory powers of police to arrest without a warrant).

[6] The requirement that the misdemeanor be committed in the officer's presence is not at issue in this case. Cf. *Welsh*, 466 U.S. at 756 (White, J., dissenting) ("But the requirement that a misdemeanor must have occurred in the officer's presence to justify a warrantless arrest is not grounded in the Fourth Amendment."); 3 W. LaFave, *Search and Seizure* § 5.1(b), at 21 (3d ed. 1996).

[7] See also *Johnson* v. *United States*, 333 U.S. 10, 15 (1948); *Carroll*, 267 U.S. at 156 ("The usual rule is that a police officer * * * may only arrest without a warrant one guilty of a misdemeanor if committed in his presence."); *John Bad Elk* v. *United States*, 177 U.S. 529, 534 (1900) ("[A]n officer, at common law, was not authorized to make an arrest without a warrant, for a mere misdemeanor not committed in his presence."); *Kurtz* v. *Moffitt*, 115 U.S. 487, 498-499 (1885); see also *Davis* v. *United States*, 328 U.S. 582, 614 (1946) (Frankfurter, J., dissenting).

[8] See *Higbee* v. *City of San Diego*, 911 F.2d 377, 379-380 (9th Cir. 1990); *United States* v. *Trigg*, 878 F.2d 1037, 1041 (7th Cir. 1989); *Fisher* v. *Washington Metro. Area Transit Auth.*, 690 F.2d 1133, 1139 & n.6 (4th Cir. 1982); *Street* v. *Surdyka*, 492 F.2d 368, 370-373 (4th Cir. 1974). But see *Staker* v. *United States*, 5 F.2d 312, 314 (6th Cir. 1925).

treated as an essential aspect of the common law arrest power.

3. The breach of the peace limitation on misdemeanor arrests also finds no support in the legislation of Congress or the States. While Congress has generally retained the "in the presence" requirement for misdemeanor arrests by federal law enforcement officers, no federal statute confines misdemeanor arrests to breaches of the peace. See, *e.g.*, 18 U.S.C. 3052 (FBI agents authorized to "make arrests without warrant for any offense against the United States committed in their presence"), 3053 (same, for U.S. marshals and deputies), 3056(c)(1)(C) (same, for Secret Service).[9] "Because there is a strong presumption of constitutionality due to an Act of Congress, especially when it turns on what is 'reasonable,'" *Watson*, 423 U.S. at 416 (quotation marks omitted), Congress's consistent omission of a breach of the

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[9] See also 16 U.S.C. 460*l*-6a(e) (authorizing arrest without a warrant for fine-only offenses committed in national parks or federally administered recreation sites or facilities); 18 U.S.C. 3061(a)(2) (postal inspectors may "make arrests without warrant for offenses against the United States committed in their presence"), 3063(a)(3) (same for Environmental Protection Agency officers); 19 U.S.C. 1589a(3) (same for customs officers); 21 U.S.C. 878(a)(3) (same for Drug Enforcement Administration officers); 25 U.S.C. 2803(3)(A) (Bureau of Indian Affairs officers may "make an arrest without a warrant for an offense committed in Indian country if * * * the offense is committed in the presence of the employee"); 28 U.S.C. 566(d) (in protecting courts and federal judicial officers, a U.S. marshal may "make arrests without warrant for any offense against the United States committed in his or her presence"); see generally U.S. Gen. Acct. Ofc., *Federal Law Enforcement: Investigative Authority and Personnel at 32 Organizations* App. II & III (GAO/GGD-97-93, Sept. 1996); U.S. Gen. Acct. Ofc., *Federal Law Enforcement: Investigative Authority and Personnel at 13 Agencies* App. I & II (GAO/GGD-96-154, Sept. 1996). Congress has also authorized certain law enforcement officers to effect warrantless arrests for specific offenses, some of which are not felonies. See, *e.g.*, 16 U.S.C. 668b(a), 670j(b)(1), 690e(a), 706, 727(a), 742j-1(d), 831c-3(b), 916g, 959(d)(1), 971f(a)(2), 972g(d), 1172(d), 1338(b), 1377(d)(1), 1540(e)(3), 3375(b); 21 U.S.C. 372(e)(4); 22 U.S.C. 1978(f)(4)(A); 33 U.S.C. 446, 452, 1321(m)(1)(B); 50 U.S.C. App. 2411(a); 16 U.S.C. 668dd(g) (Supp. IV 1998); 16 U.S.C. 5506(c)(1)(A) (1994 & Supp. IV 1998).

peace requirement for warrantless misdemeanor arrests counsels strongly against incorporating such a limitation into the Fourth Amendment.

All fifty States and the District of Columbia, likewise, authorize at least some (if not all) of their law enforcement officers to execute warrantless misdemeanor arrests in the absence of a breach of the peace. See, *e.g.*, Ala. Code § 15-10-3(a)(1) (1995 & Supp. 1999) (authorizing warrantless arrest for any "public offense" committed in the presence of the officer); Ariz. Rev. Stat. Ann. § 13-3883(a)(2) (West Supp. 1999) (authorizing arrest without a warrant when a misdemeanor has been committed in the officer's presence).[10] The Model Code of Prearraignment Procedure similarly authorizes warrantless arrests where the officer has reasonable cause to believe that the person has committed "a misdemeanor or petty misdemeanor in the officer's presence." *Model Code of Prearraignment Procedure* § 120.1, at 13 (1975). Academic scholars have also long acknowledged the propriety in this country of warrantless arrests for misdemeanors even if they do not amount to a breach of the peace.[11]

4. In some contexts, common law limitations that take root in this country may suggest that a similar constraint applies under the Fourth Amendment. See *Wilson* v. *Arkansas*, 514 U.S. 927, 933 (1995) (common law "knock and announce" principle incorporated into Fourth Amendment in

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[10] We have collected representative state statutes in an appendix to this brief. See App. B, *infra*. See also W. Schroeder, *Warrantless Misdemeanor Arrests and the Fourth Amendment*, 58 Mo. L. Rev. 771, 847 (1993).

[11] See, *e.g.*, H. Voorhees, *The Law of Arrest in Civil and Criminal Actions* § 131, at 78-79 (1904) ("[B]y authority of statute, city charter, or ordinance, [an officer] may arrest without a warrant, one who, within his jurisdiction, commits a misdemeanor other than a breach of the peace, as, for example, one who is violating a city ordinance, without breaking the peace.") (footnotes omitted); *id.* § 146, at 85; Wilgus 541, 550; 3 W. LaFave, *supra*, § 5.1(b), at 12-23.

part because the rule "was woven quickly into the fabric of early American law"). But this Court "has not simply frozen into constitutional law those law enforcement practices that existed at the time of the Fourth Amendment's passage." *Tennessee* v. *Garner*, 471 U.S. 1, 13 (1985) (quoting *Payton*, 445 U.S. at 591 n.33); see also *Payton*, 445 U.S. at 600 (noting that "custom and *contemporary norms* necessarily play * * * a large role in the constitutional analysis" of what is "reasonable" under the Fourth Amendment) (emphasis added); *Warden* v. *Hayden*, 387 U.S. 294, 300-310 (1967) (rejecting common-law prohibition against searches for "mere evidence").

In this context, where the common law itself acknowledged that legislatures were not bound by a breach of the peace limitation, and where "the judgment of the Nation and Congress has for so long been to authorize warrantless public arrests on probable cause" for misdemeanors, *Watson*, 423 U.S. at 423, transposition of a breach of the peace limitation into the Fourth Amendment is unwarranted.

5. Even if some form of the "breach of the peace" limitation had taken root in the Fourth Amendment, the phrase "breach of the peace" had different meanings at common law. While some definitions focused (like petitioners and their amici) on conduct that threatened violence, disorder, or disruption, the common law at other times employed "breach of the peace" to refer to all violations of the criminal law. See, *e.g.*, H. Voorhees, *The Law of Arrest in Civil and Criminal Actions* § 117, at 72 (1904) ("a breach of the public peace is the invasion of the security and protection which the law affords every citizen"); Wilgus 574 (under the statute of Charles II, "it was held that every indictable offense was constructively a breach of the peace * * * [and] disobeying

any act of parliament was a breach of the peace") (footnotes omitted).[12]

Indeed, this Court has adopted the broader construction of "breach of the peace" in interpreting the legislative immunity from arrest granted Members of Congress by Article I, Section 6 of the Constitution, which in relevant part provides: "The Senators and Representatives * * * shall in all Cases, except Treason, Felony and Breach of the Peace, be privileged from Arrest during their Attendance at the Session of their respective Houses, and in going to and returning from the same." As this Court has explained:

> [W]hen the Constitution was written the term "breach of the peace" did not mean, as it came to mean later, a misdemeanor such as disorderly conduct but had a different 18th century usage, since it derived from breaching the King's peace and thus embraced the whole range of crimes at common law.

United States v. *Brewster*, 408 U.S. 501, 521 (1972).[13]

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[12] See also *City of Boerne* v. *Flores*, 521 U.S. 507, 539 (1997) (Scalia, J., concurring) (citing English cases to the effect that "[E]very breach of a law is against the peace."); *id.* at 540 & n.2; *City of Akron* v. *Mingo*, 160 N.E.2d 225, 228-231 (Ohio 1959); *State ex rel. Thompson* v. *Reichman*, 188 S.W. 225, 228 ("The term 'breach of the peace' is generic and includes all violations of public peace or order, or acts tending to the disturbance thereof."), on reh'g, 188 S.W. 597, 602 (Tenn. 1916) ("[W]hat can be more logical than to say that every violation of a criminal law is a breach of the peace of the state?"). The common law also recognized that the crimes constituting a breach of the peace could be expanded by statute. Wilgus 575 (noting that the phrase had been expanded to include, for example, desecrating the national flag and transporting intoxicating liquor); *Reichman*, 188 S.W. at 607.

[13] See also *Williamson* v. *United States*, 207 U.S. 425, 444 (1908) ("Now, as all crimes are offenses against the peace, the phrase 'breach of the peace' would seem to extend to all indictable offenses, as well those which are in fact attended with force and violence, as those which are only constructive breaches of the peace of the government, inasmuch as they violate its good order."); J. Story, *Commentaries on the Constitution of the United States* § 438, at 308 (Carolina Academic Press 1987) (same).

Petitioners' argument thus attempts to import into one provision of the Constitution an interpretation of "breach of the peace" that is quite different from the meaning the Framers ascribed to that phrase when drafting Article I. At a minimum, the established constitutional definition and other common law authority demonstrate that the meaning of "breach of the peace" was sufficiently unsettled to preclude elevating petitioners' restrictive reading of the phrase to the level of constitutional rule. See *Payton*, 445 U.S. at 598.

B. Constitutionalizing Restrictions On Probable-Cause-Based Arrests That Rest On The Common Law Distinction Between Felonies And Misdemeanors Would Be Unworkable

Petitioners' and their amici's effort to impose constitutional limits on misdemeanor arrests is predicated upon an anachronistic distinction between felonies and misdemeanors that has little relevance to modern criminal law. At common law, felonies consisted of crimes punishable by death or forfeiture of land. See 1 J. Stephen, *A History of the Criminal Law of England* 458 (1883).[14] The term "misdemeanor" comprised all remaining crimes except treason. See, *e.g.*, Wilgus 572.

Because of the statutory codification of criminal law in most American jurisdictions, many of the crimes considered to be misdemeanors at common law—such as assault, attempted felonies, forgery, and kidnaping—are now consid-

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Petitioners suggest (Br. 13-17) that the common law permitted warrantless arrests only for felonies and breaches of the "Public Peace," and that the term "breach of the king's peace," which encompassed all criminal laws, was not applied in delineating the power to arrest. The analysis in *Brewster*, however, which was concerned with a constitutional "privilege[] against Arrest," did not draw that distinction. See also Voorhees § 117, at 72 (all violations of the criminal law are "breach[es] of the public peace").

[14] See also *Garner*, 471 U.S. at 13-14; *Kurtz*, 115 U.S. at 499; Voorhees § 115, at 70-71; Wilgus 569.

ered felonies. See, *e.g.*, *Garner*, 471 U.S. at 14, 20 (statutory changes in the classification of crime have "made the assumption that a 'felon' is more dangerous than a misdemeanant untenable"; distinction is "highly technical" and "arbitrary"). Indeed, "[i]n this country there is no generally accepted meaning of the[] terms" felony and misdemeanor "except as given by statute." Wilgus 570; *Carroll*, 267 U.S. at 158 ("Under our present federal statutes, [the distinction between felonies and misdemeanors] is much less important and Congress may exercise a relatively wide discretion in classing particular offenses as felonies or misdemeanors.").[15]

Petitioner's proposed constitutional rule, if construed literally, would thus place undue weight on the vagaries of legislative classifications of crime. As a result, the same crime committed by the same defendant would constitutionally be subject to warrantless arrest in one jurisdiction and to only a summons or citation in another jurisdiction. For example, stalking by telephone or letter, or violation of a protective order in a domestic violence case (neither of which would necessarily have been considered a breach of the public peace under petitioners' definition) is treated as a felony in some States and a misdemeanor in others. See U.S. Dep't of Justice, Office of Justice Programs, *Stalking and Domestic Violence: The Third Annual Report to Congress Under the*

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[15] See also *Hammer* v. *Gross*, 932 F.2d 842, 853 (9th Cir.) (en banc) (Kozinski, J., concurring) (noting that, while California classifies drunk driving as a misdemeanor, impersonating a bride or bridegroom is a felony), cert. denied, 502 U.S. 980 (1991); Wilgus 573; 1 Stephen, *supra*, at 489 ("A large number of misdemeanours were created by statute at different times, but especially in the eighteenth and nineteenth centuries, which differ in no essential respect from the common crimes distinguished as felonies."); 2 Stephen, *supra*, at 189, 193 ("[S]ince the substitution of milder punishments for death, the distinction [between felonies and misdemeanors] has become unmeaning and a source of confusion, especially as many offences have been made misdemeanours by statutes, which render the offender liable to punishments as severe as those which are now usually inflicted upon persons convicted of felony.").

Violence Against Women Act 24-26 & App. B (July 1998) (chronicling state legislation).[16] And the State of New Jersey appears to classify most of its crimes as misdemeanors. N.J. Stat. Ann. §§ 2C:1-4, 2C:1-5 (West 1995). This Court should be hesitant to constitutionalize legislative labels that are often the "result[] of evolution or accident" (Wilgus 568) and to adopt a rule under which "the search and seizure protections of the Fourth Amendment are so variable" (*Whren*, 517 U.S. at 815).

The misdemeanor/felony distinction would also prove difficult to apply by police officers on the street. Frequently the line between felony and misdemeanor conduct is dependent upon the offender's prior criminal history or the amount of money or of a drug at issue. See, *e.g.*, 18 U.S.C. 510 (1994 & Supp. IV 1998) (forgery of Treasury checks under $500 is a misdemeanor); 21 U.S.C. 841, 842, 844 (1994 & Supp. IV 1998). A police officer who witnesses the forgery of a Social Security check or an individual possessing an unknown quan-

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[16] See also U.S. Dep't of Justice, Bureau of Justice Assistance, *Regional Seminar Series on Developing and Implementing Antistalking Codes* 53-55 (Table 9) (June 1996); Institute for Law and Justice, *Domestic Violence: A Review of State Legislation Defining Police and Prosecution Duties and Powers* (*Domestic Violence*) 2, 7-10, 25 (Mar. 1998); Institute for Law and Justice, *State Stalking Legislation: A Status Report—1997* (*State Stalking Legislation*), at 5 (Exh. 1) and Apps. 1 & 2 (Mar. 1998).

At least 28 States and the District of Columbia, moreover, mandate or strongly encourage arrests in stalking and domestic violence cases as a matter of policy. Petitioner's proposed construction of the Fourth Amendment could imperil some of those important law enforcement policies and programs. *State Stalking Legislation* 19 (Exh. 4) (documenting States that authorize arrests without a warrant for stalking); *Domestic Violence* 12 ("Today all but 1 state authorizes warrantless arrests of domestic violence offenders based solely on a probable cause determination," and "[i]n 20 states and the District of Columbia police arrest is required when the officer determines that probable cause exists."), 13, 76 (48 states authorize warrantless arrests based on a probable cause determination that a protective order has been violated). The laws of thirteen States explicitly bar police from simply issuing citations or appearance tickets in lieu of a formal arrest in domestic violence cases. *Domestic Violence* 16.

tity of drugs (neither of which would necessarily qualify as a breach of the peace in petitioners' view) will not know whether a warrantless arrest is permitted until after the offender is seized, the evidence collected, and the defendant's criminal history checked. See *Berkemer* v. *McCarty*, 468 U.S. 420, 430-431 (1984) ("The police often are unaware when they arrest a person whether he may have committed a misdemeanor or a felony. * * * Indeed, the nature of his offense may depend upon circumstances unknowable to the police, such as whether the suspect has previously committed a similar offense or has a criminal record of some other kind.") (footnote omitted).

Nor can it be assumed that misdemeanors that do not amount to a breach of the peace are less serious crimes for which enforcement can be relaxed at little social cost. The forgery of a poor, elderly person's $400 Social Security check (18 U.S.C. 495, 510 (1994 & Supp. IV 1998)) may distress and financially embarrass that victim. An officer's arrest of an individual who mutilates federal bank notes by removing the corner dollar values (18 U.S.C. 333) may expose a counterfeiting operation that would cost the taxpayers a significant amount of money. And domestic violence that does not rise to petitioners' definition of a common law breach of the peace (such as where the victim of a battery does not scream or otherwise disturb the public, see Voorhees § 121, at 74) may nevertheless inflict considerable suffering on the victim.

II. THE FOURTH AMENDMENT PERMITS ARRESTS BASED ON PROBABLE CAUSE FOR OFFENSES, INCLUDING TRAFFIC OFFENSES, THAT ARE NOT PUNISHABLE BY INCARCERATION

Petitioners' alternative contention (Br. 11-13, 23-26) is that, even when the police possess probable cause, they may not effectuate an arrest if the authorized punishment for the violation is a fine. The fact that an offense is not punishable by incarceration, however, does not strip the offense of its

criminal character. Nor does it diminish the governmental interest in ensuring compliance with the law and the imposition of authorized penalties.

A. Fines Have Long Been An Important Means Of Enforcing The Criminal Law

Fines have a long history in the criminal law. In 1413, persons found guilty of forging property deeds were required to "make fine and ransom at the king's pleasure." 3 Stephen, *supra*, at 181. Offenses as varied as "cutting off the ears of the king's subjects," burning carts loaded with coal, bribery in parliamentary elections, and the unlawful collection of interest were, for a period of time, punishable only by a fine. *Id.* at 189, 198, 253. Cases specifically recognized that "ordinances punishing by fine" certain types of misconduct "were *penal* laws." Wilgus 551 n.60 (citing *County of Wayne* v. *City of Detroit*, 17 Mich. 390 (1868), and *People* v. *Controller*, 18 Mich. 445, 576 (1869)).

In the modern day, government continues to rely upon fines as an important means of punishing crime. Congress has created more than 85 criminal offenses for which a fine is the only authorized sanction. See, *e.g.*, 14 U.S.C. 84 (interference with aids to navigation); 15 U.S.C. 1338 (cigarette labeling and advertising); 16 U.S.C. 422d, 423f (vandalism at national monuments and military parks); 18 U.S.C. 243 (exclusion of jurors on account of race or color), 244 (discrimination against person wearing uniform of the armed forces), 475, 489 (imitating or reproducing U.S. obligations, securities, or coins); see also App. A, *infra*.

The arguments of petitioners and their amici assume that the decision to withhold incarceration as punishment for a crime diminishes the seriousness of the offense. While the type of sanction authorized is an important indication of seriousness, *Welsh*, 466 U.S. at 754 n.14; see *Lewis* v. *United States*, 518 U.S. 322, 326 (1996), the sanction chosen by government cannot be the sole, dispositive factor in evaluating

the public's interest in enforcement. The selection of a punishment for a crime reflects a complicated judgment about the nature of the crime, its cost to society, and the best means of deterring violations, promoting rehabilitation, and other factors. For example, many prosecutors' offices have adopted diversion programs for first-time domestic violence and drug offenders. First-time offenders are given probation and required to meet a variety of educational, employment, and counseling requirements, in lieu of incarceration. See also *Bearden* v. *Georgia*, 461 U.S. 660, 662 (1983) (discussing the Georgia First Offender's Act). It is true that incarceration remains a potential penalty in the diversion-program cases. But that does not significantly distinguish the case at hand, because individuals who refuse to pay the fine for an ordinance violation (for reasons other than poverty) often can be jailed. See, *e.g.*, 65 Ill. Comp. Stat. Ann. § 5/1-2-1 (West 1996); *Bearden*, 461 U.S. at 668; *Tate* v. *Short*, 401 U.S. 395, 400 (1971).

A decision to limit the sanction for a violation to a fine thus does not translate into a lack of interest in or commitment to enforcing the law. Given the exploding prison population and the generally high recidivism rates for released prisoners,[17] governments that experiment with alternatives to incarceration, such as fines, should not find their hands tied in enforcing and implementing those alternative sanctions. Nor should the Fourth Amendment categorically declare that such experimentation, as a matter of constitutional law, reflects such a diminished community interest in law enforcement that probable cause arrests are impermissible.

[17] See U.S. Bureau of Justice Statistics, *Prison Statistics* (1999), available at http://www.ojp.usdoj.gov/bjs/prisons.htm; U.S. Bureau of Justice Statistics, *Survey of State Prison Inmates* 11 (1991); U.S. Bureau of Justice Statistics, *Offenders Returning to Federal Prison, 1986-97* (Sept. 2000).

B. The Fourth Amendment Permits Seizures For Offenses Punishable Only By Fine

This Court's decisions have recognized that the Fourth Amendment does not preclude seizures where the offense is not punishable by incarceration. Stops for traffic violations have long been permitted without reference to the potential penalty for the infraction. See, *e.g.*, *Pennsylvania* v. *Mimms*, 434 U.S. 106, 107 (1977) (driving with expired license plate).[18] Recently, in *Whren* v. *United States*, *supra*, this Court unanimously rejected an effort to require more than probable cause to justify a seizure for a "civil" traffic violation, 517 U.S. at 808. The petitioners in *Whren* argued that, in analyzing the reasonableness of the seizure, courts should factor in the purportedly diminished governmental interest in enforcing "minor traffic infractions." *Id.* at 816-817. While acknowledging "in principle" that every Fourth Amendment case entails a balancing of relevant factors, the Court held that "the result of that balancing is not in doubt where the search or seizure is based upon probable cause." *Id.* at 817. The officer's "probable cause to believe the law has been broken" necessarily "'outbalances' private interest in avoiding police contact." *Id.* at 818.[19]

[18] See also *Michigan* v. *DeFillippo*, 443 U.S. 31, 36-40 (1979); *Gustafson* v. *Florida*, 414 U.S. 260, 265 (1973); *United States* v. *Robinson*, 414 U.S. 218, 234-235 (1973).

[19] The Court ruled that actual balancing is reserved for those cases where probable cause is absent or the seizure is "conducted in an extraordinary manner, unusually harmful to an individual's privacy or even physical interests." *Whren*, 517 U.S. at 818. Such extraordinary searches or seizures include surgical intrusion (*Winston* v. *Lee*, 470 U.S. 753 (1985)), the use of deadly force (*Tennesse* v. *Garner*, *supra*), or warrantless or unannounced entries into the home (*Wilson* v. *Arkansas*, *supra*; *Welsh*, 466 U.S. at 740). None of those activities nor anything remotely like them occurred here.

The Court rejected the *Whren* petitioners' objections that traffic laws are so multitudinous and inadvertently violated as to render the stops "extraordinary," stating:

> [W]e are aware of no principle that would allow us to decide at what point a code of law becomes so expansive and so commonly violated that infraction itself can no longer be the ordinary measure of the lawfulness of enforcement. And even if we could identify such exorbitant codes, we do not know by what standard (or what right) we would decide, as petitioners would have us do, which particular provisions are sufficiently important to merit enforcement.

517 U.S. at 818-819.

This case involves a short custodial arrest, and *Whren* involved a stop. But both qualify as seizures under the Fourth Amendment. *Whren*, 517 U.S. at 809-810; *Watson*, 423 U.S. at 414- 424. Furthermore, the extent of the seizure was not a factor in the *Whren* Court's analysis precisely because such balancing was deemed unnecessary for routine seizures based on probable cause. See 517 U.S. at 817; see also *Robbins* v. *California*, 453 U.S. 420 450 (1981) (Stevens, J., dissenting) ("As a matter of constitutional law, however, any person lawfully arrested for the pettiest misdemeanor may be temporarily placed in custody.") (footnote omitted), overruled, *United States* v. *Ross*, 456 U.S. 798 (1982). Surely, here, where a violation of the *criminal* law is involved, as much as for *Whren*'s civil violation, "there is no realistic alternative to the traditional common-law rule that probable cause justifies a search and seizure," and so "infraction itself" should remain "the ordinary measure of the lawfulness of enforcement." *Whren*, 517 U.S. at 818-819.[20]

[20] In *Welsh*, the Court held that a State's classification of an offense as noncriminal and the modest sanction imposed were relevant in assessing whether officers could make a warrantless arrest in the home. 466 U.S. at 752-754. *Whren*, however, makes clear that, for routine seizures based on probable cause outside the home, such considerations play no part in the constitutional analysis. 517 U.S. at 818; see also *Schmerber* v. *California*, 384 U.S. 757, 766-772 (1966).

A custodial arrest may serve valid purposes even where the authorized penalty upon conviction is not incarceration. The police may need to preserve evidence, confirm the suspect's identity, defuse and control a situation, or abate a continuing violation. Jurisdictions that mandate or encourage arrests of individuals who violate domestic violence protective orders, shoplifters, or runaways may consider their arrest policy part of a larger law enforcement strategy designed to cure minor violations before a pattern of criminality develops. Furthermore, governments may legitimately and reasonably determine that their officers should not be forced to make spot decisions in the heat of an encounter about the reliability of a suspect's identification, promise to appear in court, or promise not to repeat the offense. Relatedly, jurisdictions may reasonably determine, for a variety of reasons, that officers should not be required to process paperwork and both determine the appropriateness of and collect cash bonds at the scene of an arrest. Those purposes justify the arrest even where the legislature does not deem it necessary to punish violators upon conviction with incarceration.

Nor, contrary to the argument of Judge Wiener in dissent below (Pet. App. 18a, 20a), does an arrest and its attendant processing at a police station entail the unconstitutional infliction of "punishment" on defendants facing fines. This Court has long recognized that probable cause "provides legal justification for arresting a person suspected of crime, and for a brief period of detention to take the administrative steps incident to arrest." *Gerstein*, 420 U.S. at 113-114; see also *United States* v. *Salerno*, 481 U.S. 739, 749 (1987) ("If the police suspect an individual of a crime, they may arrest and hold him until a neutral magistrate determines whether

probable cause exists."). Arrest and booking thus represent not punishment, but the admnistrative processing of a criminal suspect—a type of seizure that is reasonable, within the meaning of the Fourth Amendment, if predicated on probable cause. And the government's authority to initiate the criminal process has never been held to depend upon the type of punishment authorized for the offense charged.[21]

Indeed, this Court has generally characterized even significant periods of pretrial detention as a "regulatory restraint," rather than punishment. See *Bell* v. *Wolfish*, 441 U.S. 520, 537 (1979); see also *Salerno*, 481 U.S. at 746 ("[T]he mere fact that a person is detained does not inexorably lead to the conclusion that the government has imposed punishment."); *id.* at 748 (pretrial detention under the Bail Reform Act "is regulatory in nature"). In light of the Court's conclusion that the lengthy and intrusive forms of detention in *Bell* and *Salerno* do not constitute punishment, the suggestion that the one hour petitioner Atwater spent being administratively processed at the station house constituted punishment fails.[22]

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[21] See *Michigan* v. *Summers*, 452 U.S. 692, 702-703 (1981); *Higbee*, 911 F.2d at 380 ("Plaintiffs were not being punished. They were merely being taken to jail to be booked and processed in the customary manner."); *Reichman*, 188 S.W. at 230 (because it serves a distinct law enforcement purpose, arrest for violation of liquor laws is permissible even though imprisonment may not be available as punishment); Wilgus 543 (an arrest "is the apprehension or taking into custody of an alleged offender, in order that he may be brought into the proper court to answer for a crime.") (footnote and internal quotation marks omitted); W. LaFave, *Arrest: The Decision to Take a Suspect into Custody* 186-189 (1965); 4 Blackstone, *supra* at 286; cf. *Ehrlich* v. *Giuliani*, 910 F.2d 1220, 1223 (4th Cir. 1990) ("One of the most important duties of a prosecutor pursuing a criminal proceeding is to ensure that defendants * * * are present at trial."); *Lerwill* v. *Joslin*, 712 F.2d 435, 438 (10th Cir. 1983) (arrest brings the subject before the court and subjects him to its immediate authority, without which "the initiation of a prosecution would be futile").

[22] The officer's subjective motivation is irrelevant to this inquiry. *Whren*, 517 U.S. at 813.

C. A Distinction In Arrest Authority Based On Punishment Poses Enforcement Difficulties

Like the effort to confine misdemeanor arrests to breaches of the peace, a constitutional rule that allows arrests only for offenses punishable by imprisonment raises problems of practical implementation. A number of laws make first offenses punishable by a fine or other non-incarceration penalty, but permit incarceration for subsequent offenses.[23] A police officer witnessing an offense on the street, however, has no way of knowing whether the perpetrator is a first-time offender.[24] Failure to arrest could leave a repeat offender on the street; arrest could subject the officer to personal liability for damages. "This is certainly a very unsatisfactory line of difference" for police officers to administer. *Carroll*, 267 U.S. at 157.

Petitioners' proposal (Br. 46) that the Fourth Amendment ban all arrests for fine-only offenses unless the arrest is "necessary" for enforcement of the laws or the "offense would otherwise continue and pose a danger to others" will likewise be difficult to implement on the streets.[25] For

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[23] See, *e.g.*, *Welsh*, 466 U.S. at 746 (first offense is a civil infraction punishable by $200 fine; subsequent offenses punishable by imprisonment of up to one year); *Carroll*, 267 U.S. at 154; Va. Code § 18.2-266.1(B) (Michie 1996); *id.* § 18.2-270 (Michie 1996 & Supp. 1999) (first-time offense of driving while intoxicated punishable by license suspension and fine; subsequent offenses are punishable as a misdemeanor by fine and imprisonment; third offense within ten years is a felony); Ala. Code § 32-5A-191(b) (Michie 1999) (first-time offense of driving under the influence subject only to license suspension if driver is under 21); Wis. Stat. Ann. § 346.65(2)(a) (West 1999) (first-time offense of driving under the influence punishable only by a fine).

[24] Not all jurisdictions can afford to equip every police car with up-to-date computers. Even for those that can, computers often break down or, due to heavy usage, communications are significantly delayed.

[25] Petitioners propose (Br. 46) to limit their rule to traffic offenses, but they offer nothing other than *ipse dixit* and the already-rejected argument that traffic offenses are multitudinous (see *Whren*, 517 U.S. at 818-819) to explain why such an artificial category should be carved out of the Fourth

example, while petitioners take for granted that petitioner Atwater's checkbook (she had no other form of identification with her, Pet. App. 30a) satisfactorily established her identification in a small-town setting based on the officer's subjective knowledge, it is far from clear whether and under what circumstances (such as urban settings or areas with transient populations, like many of the specialized jurisdictions policed by federal officers) an officer's arrest of a person who, like petitioner Atwater, has committed multiple traffic offenses and offers only a checkbook for identification will be deemed objectively unreasonable under the Fourth Amendment. See *Knowles* v. *Iowa*, 525 U.S. 113, 119 (1998) ("[I]f a police officer is not satisfied with the identification furnished by the driver, this may be a basis for arresting him rather than merely issuing a citation.").[26] Similarly, while petitioners' test (Br. 46) professes to reserve the ability to arrest traffic offenders to prevent recurrence of the offense, they offer no guidelines by which courts can review the assessment of officers on the scene, who frequently encounter traffic offenders for the first time, that a person stopped poses a risk of repeating the offense a few miles down the road.

Amendment. In fact, a traffic-offense line would be particularly incongruous because this Court's Fourth Amendment jurisprudence has consistently recognized that persons in automobiles have diminished—not enhanced—expectations of liberty and privacy because of the public and pervasively regulated character of automobile travel. See, *e.g.*, *New York* v. *Class*, 475 U.S. 106, 112 (1986) (noting that automobiles, unlike homes or offices, are subject to a "web of pervasive regulation"); *United States* v. *Martinez-Fuerte*, 428 U.S. 543, 561 (1976) ("[O]ne's expectation of privacy in an automobile and of freedom in its operation are significantly different from the traditional expectation of privacy and freedom in one's residence."); *South Dakota* v. *Opperman*, 428 U.S. 364, 368 (1976) (noting the "obviously public nature of automobile travel," under which cars routinely "travel[] public thoroughfares where both [their] occupants and [their] contents are in plain view"). And if the argument that probable cause is insufficient to justify an arrest is accepted here, it is not at all clear why the Fourth Amendment would not also require balancing the need to arrest against its intrusiveness for all other misdemeanors or even some felonies, such as those involving possession-amounts of drugs or white-collar crimes, where it could equally be argued that (1) the officer unquestionably knew the suspects' identities because they were established citizens of the community, (2) they promised not to repeat the offense and they had no prior criminal record indicating that they would, and (3) they signed a promise to appear in court.

[26] Petitioners' contention (Br. 43) that permitting arrests for fine-only offenses will nullify the holding in *Knowles* is misplaced. *Knowles* did not limit the authority to arrest; it held only that a search incident to arrest is impermissible under the Fourth Amendment when a custodial arrest is not made. Any officer who searches before effectuating an arrest (see *Rawlings* v. *Kentucky*, 448 U.S. 98, 110-111 (1980)) still must make an arrest regardless of the outcome of that search, or face a Section 1983 action based on *Knowles*.

Judicial review, through the medium of personal damages actions, of an officer's on-the-spot determination that an individual is unlikely to appear in court or pay a fine will be similarly difficult. While it may be obvious when the offender destroys the citation or states that he will not pay, an officer's judgment based on more subtle indications such as body language or other indicia of credibility will be harder to defend after the fact. Yet the failure to respond to citations is a significant problem for law enforcement. We have been informed that s significant percentage of all citations issued by federal law enforcement agencies go unpaid in the absence of concerted collection efforts.

In our experience, federal officers generally do not make arrests for fine-only offenses in the absence of a good reason. Nevertheless, a constitutional rule should not be adopted that would restrict the officers' ability to make an on-the-spot assessment that an arrest is needed to maintain control of a situation, or that forces officers who have probable cause to believe that a crime has been committed, on pain of personal liability for money damages, to apply such an uncertain balancing test on the street and in the heat of an encounter. "A single, familiar standard" of probable cause "is essential to guide police officers, who have only limited time and expertise to reflect on and balance the social and individual

interests involved in the specific circumstances they confront." *Dunaway*, 442 U.S. at 213-214. While it no doubt frequently is good policy and a wise use of police resources not to make arrests for fine-only offenses, persons who have violated the duly enacted criminal laws of a jurisdiction have no constitutional right to be immune from routine criminal processing.

D. Legislatures Have Prevented And Can Continue To Prevent Arbitrary Law Enforcement

Quite apart from the impracticality of petitioners' proposed legal test, petitioners have failed to demonstrate that a widespread problem of abusive arrests for misdemeanors or traffic offenses exists. To the contrary, even a dissenting judge below acknowledged that the facts of the present case were "extreme" (Pet. App. 12a) and arose only in the case of the "admittedly rare rogue patrol officer" (*id.* at 19a). In the view of the federal government, moreover, although federal law authorizes arrests for seatbelt violations (36 C.F.R. 4.15), it generally is inappropriate to enforce that law other than by way of citation. In fact, the United States Park Police, in conjunction with the local district courts, have developed a "collateral list" procedure under which officers may issue citations for certain misdemeanor crimes for which arrest is otherwise authorized, including seatbelt offenses, and may either require a subsequent appearance in court or allow the offender to avoid a court appearance by paying a designated fine.[27]

[27] Further, the Department of Transportation and its National Highway Traffic Safety Administration consider arrests for seatbelt violations to be counterproductive to the national goal of increasing seatbelt compliance, because the adverse public reaction to such arrests could dissuade jurisdictions from adopting mandatory seatbelt usage laws, especially those laws that make the failure to wear a seatbelt a primary offense enforceable in its own right. See generally NHTSA, *Standard Enforcement Saves Lives: The Case for Strong Seat Belt Laws* 13 (1999) (noting that primary enforcement laws are considerably more effective in enhancing seatbelt usage, and thus reducing traffic fatalities, than those laws that permit citations for failure to wear a seatbelt only when the vehicle is stopped for a different traffic offense).

Although not presented by the facts of this case, petitioners and their amici raise concerns about discriminatory enforcement. But this Court made quite clear in *Whren* that such claims should be addressed through the Equal Protection Clause, rather than through the Fourth Amendment. 517 U.S. at 813. Indeed, amicus ACLU acknowledges (Br. 9) that courts across the country are increasingly recognizing such equal protection claims.

An additional consideration limits the risk of abusive use of the arrest power. As the brief of amicus Institute on Criminal Justice indicates, officers face enormous disincentives to arresting suspects for the commission of a minor offense. While traffic stops can take little time, occur outside the view of supervisors and other officers, and entail little if any paperwork, custodial arrests are an entirely different matter. A single arrest can consume hours of an officer's time; his actions are subject to supervisorial review and peer scrutiny at the station house; and the paper trail that attends arrests would make it much easier to document a pattern of discriminatory law enforcement. Officers also generally do not advance their own professional interests by consuming enormous amounts of time and limited police resources by arresting for minor misdemeanors and fine-only offenses. Officers who act out of vindictiveness, bias, or other improper motive may also be subject to internal disciplinary procedures. See, *e.g.*, U.S. Marshal's Office, *Code of Professional Responsibility: Standards of Conduct* (May 17, 1999), available at http://156.9.230.3/prt/policy/ directive/web/99-18.htm; see also C.A. App. 400, 407, 410 (both Chief of Police and the City mayor made clear to respondent Turek that they disapproved of his handling of petitioner Atwater's offense).

Crafting a new constitutional rule for fine-only misdemeanors is not the only available safeguard against possible abuses. As amicus ACLU demonstrates (Br. 22-25), a number of States have taken steps to limit the authority of police to arrest for misdemeanor, traffic, or fine-only offenses. See also App. C, *infra*; *Berkemer*, 468 U.S. at 437 n.26; 625 Ill. Comp. Stat. Ann. ILCS §§ 5/6-800 *et seq.* (Nonresident Violator Compact of 1977). The nature, scope, and context of the restrictions adopted, however, vary; no uniform national consensus on restricting arrest authority has emerged. Accordingly, such decisions are best made locally in light of the particular policy concerns and needs for law enforcement of individual communities, rather than homogenized through constitutional rule. Once a community has adjudged certain behavior to be criminal, the Fourth Amendment should not require police officers, who have probable cause to believe that an offense has been committed, to adopt the least restrictive or least intrusive means of enforcing the law. See *United States* v. *Sharpe*, 470 U.S. 675, 687 (1985) ("[T]he fact that the protection of the public might, in the abstract, have been accomplished by 'less intrusive' means does not, by itself, render the search unreasonable.").

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

SETH P. WAXMAN
Solicitor General
JAMES K. ROBINSON
Assistant Attorney General
MICHAEL R. DREEBEN
Deputy Solicitor General
PATRICIA A. MILLETT
Assistant to the Solicitor General
THOMAS M. GANNON
Attorney

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APPENDIX A

Federal Criminal Offenses Punishable By Fine Only

5 U.S.C. 552a(i) (knowingly disclosing individually identifiable information in government records, or willfully maintaining as a government employee a system of records without meeting notice requirements, or requesting or obtaining individual government records under false pretenses);

7 U.S.C. 228b-4 (while acting as a live poultry dealer or employed by such, failing to obey an order of the Secretary of Agriculture with respect to financing or payment arrangements for poultry);

7 U.S.C. 472 (failing to furnish information to the Department of Agriculture on the grades and staple length of cotton on hand and failure to permit inspection);

7 U.S.C. 608c(14) (violations of certain orders governing the handling of agricultural commodities);

7 U.S.C. 1373(a) (1994 & Supp. IV 1998) (failing to make a report on or keep a record of certain agricultural activities);

7 U.S.C. 1596 (violating any provision of chapter 37 of title 7, regarding seeds, or rules promulgated thereunder);

7 U.S.C. 1642(c) (failing to make a report or keep a record as required by regulations promulgated by the President under the International Wheat Agreement);

7 U.S.C. 3604 (failing to keep information or submit a required report, knowingly submitting a false report, or violating a rule or regulation under the law implementing the 1977 International Sugar Agreement);

12 U.S.C. 1713(b) (violating certification made by mortgagor of affordable rental housing to obtain federal mortgage insurance that he or she will not discriminate against families with children or sell property while mortgage is in effect);

12 U.S.C. 1738(a) (violating certification made by mortgagor to obtain federal mortgage insurance, available under provision for relief of housing shortage for WWII veterans, that he will not discriminate against families with children or sell property while mortgage is in effect);

12 U.S.C. 1750b(a) (violating certification made by mortgagor to obtain federal mortgage insurance for property in area certified by President as a critical defense housing area that he will not discriminate against families with children or sell property while mortgage is in effect);

13 U.S.C. 212 (while serving as an officer or employee of the Census Bureau, neglecting or refusing without justification to perform duties);

13 U.S.C. 223 (while the owner or manager of a hotel, apartment house, boarding or lodging house, tenement, or other building, refusing or willfully neglecting to furnish names of occupants to census or to give free ingress and egress to census employees);

14 U.S.C. 83 (establishing, erecting, or maintaining any aid to maritime navigation in or adjacent to waters subject to

the jurisdiction of the United States without obtaining authority to do so from the Coast Guard);

14 U.S.C. 84 (removing, changing the location of, willfully damaging, making fast to, or interfering with any aid to maritime navigation installed by the Coast Guard);

14 U.S.C. 85 (violating any rule or regulation promulgated by the Coast Guard with respect to the establishment, maintenance and operations of lights and signals on fixed and floating structures);

15 U.S.C. 159 (engaging in business with China under a name in connection with which the legend "Federal Inc. U.S.A." is used);

15 U.S.C. 241 (packing, selling, or offering for sale lime in unmarked barrels, or selling, charging for, or purporting to deliver any less weight of lime than established by law);

15 U.S.C. 330d (knowingly and willfully violating Section 330a of Title 15, which prohibits engaging or attempting to engage in weather modification activities without submitting required reports to the Secretary of Commerce);

15 U.S.C. 1338 (violating laws on cigarette labeling and advertising);

15 U.S.C. 4404(a) (violating laws on warnings and labeling for smokeless tobacco);

16 U.S.C. 373 (causing damage to Hot Springs National Park);

16 U.S.C. 374 (taking, using, or bathing in water of Hot Springs National Park in violation of rules and regulations promulgated by the Secretary of the Interior and without providing evidence of being a patient of a physician authorized to prescribe the waters of the Hot Springs);

16 U.S.C. 422d (destroying monuments in Moores Creek National Battlefield);

16 U.S.C. 423f (destroying monuments in Petersburg National Battlefield);

16 U.S.C. 425g (destroying monuments in Fredericksburg and Spotsylvania County Battle Fields Memorial);

16 U.S.C. 426i (destroying monuments in Stones River National Battlefield);

16 U.S.C. 428i (destroying monuments in Fort Donelson National Battlefield);

16 U.S.C. 430h (destroying monuments in Vicksburg National Military Park);

16 U.S.C. 430i (destroying monuments in Guilford Courthouse National Military Park);

16 U.S.C. 430q (destroying monuments in Monocacy National Battlefield);

16 U.S.C. 460*l*-6a(e) (violating rules and regulations regarding the collection of fees at national parks, military parks, monuments, and seashores);

16 U.S.C. 916e (failing to make, keep, or furnish any catch return record or other report required by the whaling convention or other law or regulation);

18 U.S.C. 154 (1994 & Supp. IV 1998) (while serving as a bankruptcy trustee, purchasing property of bankruptcy estate or knowingly refusing reasonable opportunity for inspection of documents and accounts relating to the estate);

18 U.S.C. 243 (excluding juror on account of race or color);

18 U.S.C. 244 (discriminating against person wearing uniform of armed forces);

18 U.S.C. 291 (while serving as a judge, clerk, or deputy clerk, purchasing for less than full value a claim for the fee, mileage, or expenses of a witness, juror, or officer of the court);

18 U.S.C. 431 (while serving as a member of Congress, making or entering into a contract or agreement for the United States);

18 U.S.C. 475 (imitating an obligation or security of the United States in an advertisement or attaching a notice or advertisement to such an instrument);

18 U.S.C. 489 (making or bringing from a foreign country with intent to sell, give away, or use any token, disk, or device in the likeness of any of the coins of the United States or of any foreign country);

18 U.S.C. 511A (affixing a theft prevention decal to a motor vehicle without authorization);

18 U.S.C. 1694 (while operating a conveyance on a post route, carrying letters or packets otherwise than in the mail);

18 U.S.C. 1697 (while operating a conveyance, knowingly permitting the conveyance of anyone acting as or employed as a private express for the conveyance of letters or packages);

18 U.S.C. 1698 (while in charge of a vessel operating between ports in the United States, failing to deliver to the postmaster within the required time all letters and packages brought by the vessel and not part of the cargo);

18 U.S.C. 1699 (breaking bulk before arranging for the delivery of all letters on board to the nearest post office);

18 U.S.C. 1713 (while serving as an officer or employee of the postal service, issuing a money order before receiving the money therefor);

18 U.S.C. 1719 (making use of any official envelope, label, or indorsement authorized by law to avoid the postage or registry fee for personal mail);

18 U.S.C. 1722 (submitting false evidence to the post office relative to any publication for the purpose of securing the admission thereof at the second-class rate);

18 U.S.C. 1723 (knowingly concealing or inclosing any matter of a higher class mail in that of a lower class and depositing same for the conveyance by mail at a lower rate than would be charged for the material);

18 U.S.C. 1725 (knowingly and willfully depositing mailable matter on which no postage has been paid with intent to avoid the payment of lawful postage thereon);

18 U.S.C. 1729 (setting up or professing to keep a post office without authority from the postal service);

18 U.S.C. 1734 (while an editor or publisher, printing in a publication entered as second class mail editorial or other reading matter for which payment has been made without marking the same "advertisement");

18 U.S.C. 1762 (1994 & Supp. IV 1998) (failing to mark as such packages shipped in interstate commerce containing goods, wares, or merchandise produced wholly or in part by convicts or prisoners, except convicts or prisoners on probation or parole);

18 U.S.C. 2075 (while an officer of the United States, failing to make a return or report required by Congress or a regulation of the Department of Treasury within the time prescribed);

18 U.S.C. 2236 (1994 & Supp. IV 1998) (while serving as an officer, employee, or agent of the United States, searching any private dwelling used as such without a warrant, or maliciously and without reasonable cause searching any other building or property without a search warrant, excepting officers who obtain consent or who are serving a warrant of arrest or arresting or attempting to arrest a person committing or attempting to commit an offense in the officer's presence);

18 U.S.C. 2721-2723 (knowingly violating prohibition on release and use of certain personal information from state motor vehicle records);

18 U.S.C. 3162(b) (while serving as an attorney in a criminal trial, knowingly allowing a case to be set for trial without disclosing fact that material witness will not be available at trial, or filing a motion solely for the purpose of delay, or making a false statement for the purpose of obtaining a continuance, or otherwise willfully failing to proceed to trial without justification);

19 U.S.C. 58b(d) (failure to pay a fee for customs service);

19 U.S.C. 507(a) (neglecting or refusing to assist a customs officer upon proper demand in making any arrest, search, or seizure authorized by a law enforced or administered by customs officers);

21 U.S.C. 16-17 (violating laws prohibiting adulterated or misbranded foods or drugs);

22 U.S.C. 3104(e) (violating regulations governing information on international investments);

25 U.S.C. 202 (inducing an Indian to execute a contract, deed, or mortgage purporting to convey an interest in land held by the United States in trust for the Indian, unless the lease or deed is authorized by law);

26 U.S.C. 7262 (violating occupational tax laws relating to wagering);

26 U.S.C. 7275 (failing to indicate on the ticket or advertisement for a ticket for air travel the amount of the price attributable to port taxes);

27 U.S.C. 207 (violating certain laws regarding the sale of intoxicating liquors);

33 U.S.C. 421 (depositing refuge in or near Lake Michigan in or near Chicago);

33 U.S.C. 495 (failing or refusing to comply with certain orders of the Secretary of Transportation regarding bridges over navigable waters);

33 U.S.C. 502 (willfully failing to comply with a lawful order of the Secretary of Transportation requiring alteration to a bridge that is an unreasonable obstruction of a navigable waterway of the United States);

33 U.S.C. 519 (willfully failing to comply with a lawful order of the Secretary of Transportation regarding a bridge over navigable waters of the United States);

33 U.S.C. 915 (1986) (requiring an employee covered by the Longshore and Harbor Workers' Compensation Act to enter into an invalid agreement to contribute to a benefit fund for the purpose of providing medical services and supplies);

33 U.S.C. 941 (while an employer of persons covered by the Longshore and Harbor Workers' Compensation Act, failing to furnish and maintain reasonably safe places of employment);

38 U.S.C. 7332 (violating section providing for confidentiality of patient records of the Veterans Administration relating to

drug abuse, alcoholism, HIV infection, and sickle cell anemia);

38 U.S.C. 5701(a) (willfully using names of members, dependants, or former members of the Armed Forces for a purpose other than that for which release of the names is authorized);

42 U.S.C. 290dd-2(a) (failing to comply with law providing for the confidentiality of patient records from substance abuse treatment and education programs conducted or assisted by the United States);

42 U.S.C. 1437d(q)(6) (Supp. IV 1998) (knowingly and willfully requesting or obtaining information about an applicant for public housing under false pretenses or knowingly or wilfully disclosing such information to a person not entitled to receive it);

42 U.S.C. 14133(c) (disclosing without authorization or knowingly obtaining without authorization individually identifiable DNA information in a database created or maintained by a federal law enforcement agency);

42 U.S.C. 2277 (while or subsequent to serving in a covered capacity, knowingly communicating restricted data to an unauthorized person relating to the development and control of atomic energy);

42 U.S.C. 3544 (c)(3)(A) (1994 & Supp. IV 1998) (knowingly and willfully requesting or obtaining information about an applicant for or participant in public housing without consent or agreement);

43 U.S.C. 315a (violating law or regulation on the protection, administration, regulation, and improvement of grazing districts);

43 U.S.C. 316k (willfully grazing any class of livestock without authority under a lease or permission on lands in a grazing district in Alaska as designated by the Secretary of the Interior);

46 U.S.C. App. 194 (violating law prohibiting owners of vessels shipping goods to or between ports in the United States from inserting in any bill of lading or shipping document any agreement lessening the obligation of due diligence in operating the vessel or violating law requiring vessel transporting merchandise to or between ports of the United States to issue to shippers a bill of lading or other shipping document);

47 U.S.C. 502 (willfully and knowingly violating any rule, regulation, restriction, or condition made or imposed by the FCC or imposed by an international radio or wire communications treaty);

49 U.S.C. 526 (knowingly and willfully violating certain sections of Title 49, regulating motor carriers, or regulations or orders of the Secretary of Transportation relating thereto);

49 U.S.C. 46309(a) (while acting as an air carrier or employee thereof, knowingly and willfully offering or granting concessions or price rebates to obtain transportation at less than the lawful price, or receiving same).

49 U.S.C. 46316(a) (knowingly and willfully violating air commerce and safety laws or regulations or orders of the

Secretary of Transportation or Administrator of the Federal Aviation Administration with respect to aviation safety duties).

APPENDIX B

Statutes Authorizing Warrantless Arrests for Misdemeanor Offenses

Ala. Code § 15-10-3(a)(1) (1995 & Supp. 1999), revised by 2000 Ala. Acts 266 (authorizing warrantless arrest for any "public offense" committed or breach of the peace threatened in the presence of the officer);

Alaska Stat. § 12.25.030(a)(1) (Michie 1999) (authorizing arrest without a warrant "for a crime committed * * * in the presence of the person making the arrest");

Ariz. Rev. Stat. Ann. § 13-3883(a)(2) (West Supp. 1999) (authorizing arrest without a warrant when a misdemeanor has been committed in the officer's presence);

Ark. Code Ann. § 16-81-106(b)(2)(a) (Michie Supp. 1999) (authorizing arrest by an officer without a warrant "where a public offense is committed in his presence");

Cal. Penal Code § 836(a)(1) (West Supp. 2000) (authorizing warrantless arrest where "the person to be arrested has committed a public offense in the officer's presence");

Colo. Rev. Stat. § 16-3-102(1)(b) (1999) (authorizing officer to make warrantless arrest when "[a]ny crime has been or is being committed" in the officer's presence);

Conn. Gen. Stat. Ann. § 54-1f(a) (1994 & West 2000) (authorizing warrantless arrests for "any offense" when arrestee is taken in the act or on the speedy information of others);

Del. Code Ann. tit. 11, § 1904(a)(1) (1995) (authorizing warrantless arrest for any misdemeanor committed in the officer's presence);

D.C. Code Ann. § 23-581(a)(1)(B) (1996) (authorizing warrantless arrest where officer has probable cause to believe a person has committed an offense in the officer's presence);

Fla. Stat. Ann. § 901.15(1) (West 2000), amended by 2000 Fla. Sess. Law Serv. 00-369 (West) (warrantless arrest allowed if misdemeanor or ordinance violation committed in presence of officer)

Ga. Code Ann. § 17-4-20 (a) (1997) (authorizing warrantless arrest by officer "for a crime * * * if the offense is committed in such officer's presence");

Haw. Rev. Stat. Ann. § 803-5(a) (Michie 1999) (authorizing warrantless arrest "when the officer has probable cause to believe that [a] person has committed any offense");

Idaho Code § 19-603(1) (1997) (authorizing warrantless arrest by officer "[f]or a public offense committed or attempted in his presence");

725 Ill. Comp. Stat. Ann 5/107-2(1)(c) (West 1992) (authorizing arrest by officer without a warrant when "[h]e has reasonable grounds to believe that the person is committing or has committed an offense");

Ind. Code Ann. § 35-33-1-1(a)(4) (Michie 1998) (authorizing warrantless arrest when the officer has probable cause to believe a person "is committing or attempting to commit a misdemeanor in the officer's presence");

Iowa Code Ann. § 804.7(1) (West 1994) (authorizing warrantless arrest "[f]or a public offense committed or attempted in the peace officer's presence");

Kan. Stat. Ann. § 22-2401(d) (Supp. 1999) (authorizing warrantless arrest for "[a]ny crime, except a traffic infraction or a cigarette or tobacco infraction" committed in the officer's view);

Ky. Rev. Stat. Ann. § 431.005(1)(d) (Michie 1999) (authorizing warrantless arrest for any offense punishable by confinement committed in the officer's presence); *id.* § 431.015(2) (officer must issue citation rather than arrest for certain violations);

La. Code Crim. Proc. Ann. art. 213(3) (West 1991) (authorizing warrantless arrest where the officer "has reasonable cause to believe that the person to be arrested has committed an offense");

Me. Rev. Stat. Ann. tit. 15, § 704 (West 1980) (authorizing warrantless arrest of "persons found violating any law of the State or any legal ordinance or bylaw of a town") and *id.* tit. 17-A, § 15(B) (West 1983 & Supp. 1997), amended by 2000 Me. Laws 644, (authorizing warrantless arrests for misdemeanors committed in the officer's presence);

Md. Code Ann. art. 27, § 594B(a) (1996 & Supp. 1999) (authorizing warrantless arrest of any person who commits, or attempts to commit, "any felony or misdemeanor" in the presence of an officer);

Mass. Ann. Laws ch. 276, § 28 (Law. Co-op. 1992 & Supp. 1998) (warrantless arrest authorized for designated misdemeanor offenses); *id.* ch. 272, § 60 (Law. Co-op. 1992)

(authorizing warrantless arrest for littering offenses where identity of arrestee is not known to officer);

Mich. Comp. Laws Ann. § 764.15(a) (West 2000) (officer, without a warrant, may arrest a person if a felony, misdemeanor, or ordinance violation is committed in the officer's presence); *id.* § 780.581 (West 1998) (if the offense is punishable by a fine or by a prison term of not more than one year, the officer must take the person before a magistrate without unnecessary delay or release the person on bond);

Minn. Stat. Ann. § 629.34(c)(1) (West Supp. 2000) (authorizing warrantless arrest "[w]hen a public offense has been committed or attempted in the officer's presence");

Miss. Code Ann. § 99-3-7 (1999 & Supp. 1999) (warrantless arrest allowed for indictable offense committed in presence of officer)[1]; *id.* § 45-3- 21(1)(a)(vi) (1999) (authorizing warrantless arrest by Highway Safety Patrol Officers of "any person or persons committing or attempting to commit any misdemeanor, felony or breach of the peace within their presence or view");

Mo. Ann. Stat. § 479.110 (West 1987) (authorizing warrantless arrest of "any person who commits an offense in [the officer's] presence");

Mont. Code Ann. § 46-6-311(1) (1997) (authorizing warrantless arrest if "the officer has probable cause to believe that the person is committing an offense or that the person has committed an offense and existing circumstances require immediate arrest");

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[1] This statute applies to misdemeanor offenses. *Butler* v. *State*, 212 So.2d 573 (Miss. 1968).

Neb. Rev. Stat. § 29-404.02(2)(d) (1995) (authorizing warrantless arrest when the officer has probable cause to believe that the person has committed a misdemeanor in the presence of the officer);

Nev. Rev. Stat. § 171.172 (1999) (authorizing warrantless arrest by officer in fresh pursuit of a person who commits "any criminal offense" in the presence of the officer);

N.H. Rev. Stat. Ann. § 614:7 (1986 & Supp. 1999) (authorizing warrantless arrest by officer in fresh pursuit of any person who has committed "any criminal offense" in the presence of the officer); *id.* §§ 594:10(I)(a), 594:14 (officer may arrest without warrant upon probable cause for misdemeanor or violation committed in officer's presence, or may issue summons in lieu of arrest);

N.J. Stat. Ann. § 53:2-1 (West 1986 & Supp. 2000) (authorizing state police to arrest without a warrant "for violations of the law committed in their presence");

N.M. Stat. Ann. § 3-13-2(A)(4)(d) (Michie Supp. 1999) (authorizing officers to "apprehend any person in the act of violating the laws of the state or the ordinances of the municipality and bring him before competent authority for examination and trial."); *id.* § 30-3-6(B) (Michie 1994) (authorizing warrantless arrest for assault, battery, public affray or criminal damage to property); *id.* § 30-16-16(B) (authorizing warrantless arrest for falsely obtaining services or accommodations); *id.* § 30-16-23 (authorizing arrest without warrant of any person officer has probable cause to believe has committed the crime of shoplifting); *id.* § 3-23-3 (Michie Supp. 1999) (warrantless arrests for violations of forest fire laws committed in officer's presence); *id.* § 31-1-7 (authorizing warrantless arrests in cases of do-

mestic disturbance); see also *id.* 31-1-6 (Michie 2000) (officer who arrests a person without a warrant for a petty misdemeanor may offer the person arrested the option of a citation to appear instead of taking him to jail);

N.Y. Crim. Proc. Law § 140.10(1)(a) and (2) (McKinney 1992) (warrantless arrest allowed when officer has probable cause to believe any offense has been committed in his presence and probable cause to believe person to be arrested committed the offense; in the case of petty offenses, authority to arrest is limited to geographical area of officer's employment and county in which such offense was committed or believed to have been committed or in adjoining county);

N.C. Gen. Stat. § 15A-401(b) (1999) (authorizing a warrantless arrest where an officer has probable cause to believe the person has committed "a criminal offense" in the officer's presence and for misdemeanors out of the officers presence in certain circumstances);

N.D. Cent. Code § 29-06-15 (1)(a) (1991) (authorizing warrantless arrest "[f]or a public offense, committed or attempted in the officer's presence");

Ohio Rev. Code Ann. § 2935.03 (Anderson 1999) (authorizing warrantless arrest of a person "found violating * * * a law of this state, an ordinance of a municipal corporation, or a resolution of a township"); but see *id.* § 2935.26 (providing that notwithstanding any other provision of the Revised Code, when a law enforcement officer is otherwise authorized to arrest a person for the commission of a minor misdemeanor, the officer shall not arrest the person, but shall issue a citation, except in specified circumstances);

Okla. Stat. Ann. tit. 22, § 196(1) (West 1992 & Supp. 2000), as amended by 2000 Okla. Sess. Laws 370, (authorizing warrantless arrests "[f]or a public offense, committed or attempted in [the officer's] presence");

Or. Rev. Stat. § 133.310(1) (1997) (authorizing warrantless arrest upon probable cause for any offense except unclassified offenses, unless the maximum penalty allowed by law is equal to or greater than the maximum penalty allowed for a Class C misdemeanor; authorizing warrantless arrest for any crime occurring in the officer's presence); *id.* § 161.515(1) (a crime is an offense for which a sentence of imprisonment is authorized);

Pa. Stat. Ann. tit. 71, § 252(a) (West 1990) (authorizing warrantless arrests by state police "for all violations of the law, including laws regulating the use of the highways, which they may witness"); *id.* tit. 53, § 37005 (West 1998) (police officers "may, within the city or upon property owned or controlled by the city or by a municipal authority of the city within the Commonwealth, without warrant and upon view, arrest and commit for hearing any and all persons guilty of breach of the peace, vagrancy, riotous or disorderly conduct or drunkenness, or who may be engaged in the commission of any unlawful act tending to imperil the personal security or endanger the property of the citizens, or violating any of the ordinances of said city for the violation of which a fine or penalty is imposed."); *id.* tit. 13, § 45 (authorizing, without warrant and upon view, "arrest and commitment for hearing of any and all persons guilty of a breach of the peace, vagrancy, riotous or disorderly conduct or drunkenness or may be engaged in the commission of any unlawful act tending to imperil the personal security or endanger the property of the citizens, or violating any ordinances of said

borough, for the violation of which a fine or penalty is imposed.");

R.I. Gen. Laws § 12-7-3 (1994) (authorizing warrantless misdemeanor and petty misdemeanor arrests where "the officer has reasonable ground to believe that [the] person cannot be arrested later or may cause injury to himself or herself or others or loss or damage to property unless immediately arrested");

S.C. Code Ann. § 17-13-30 (Law. Co-op. 1985) (authorizing warrantless arrests of persons who, in the presence of the officer, "violate any of the criminal laws of this State if such arrest be made at the time of such violation of law or immediately thereafter");

S.D. Codified Laws § 23A-3-2 (Michie 1998) (authorizing warrantless arrest by officer "[f]or a public offense, other than a petty offense, committed or attempted in his presence");

Tenn. Code Ann. § 40-7-103(a)(1) (1997 & Supp. 1999) (authorizing law enforcement officer to arrest without a warrant "[f]or a public offense committed or a breach of the peace threatened in the officer's presence"); see also *id.* § 40-7-118(b)(1) (1997) ("officer who has arrested a person for the commission of a misdemeanor * * * shall issue a citation to such arrested person to appear in court in lieu of the continued custody and the taking of the arrested person before a magistrate");

Tex. Code Crim. P. Ann. art. 14.01 (West 1977) (authorizing officer's arrest of offender without a warrant "for any offense committed in his presence or within his view");

Utah Code Ann. § 10-3-915 (1999) (authorizing warrantless arrests for "any offense directly prohibited by the laws of this state or by ordinance"); *id.* § 77-7-2 (authorizing warrantless arrest for any public offense committed in presence of officer or if officer has reasonable cause to believe offense was committed and reasonable cause for believing person may flee, destroy evidence, or injure another);

Vt. R. Crim. P. 3(a) (2000) (authorizing warrantless arrests where officer has probable cause to believe that "a crime" is committed in the presence of the officer); see also *id.* 3(c) ("A law enforcement officer acting without warrant who is authorized to arrest a person for a misdemeanor under subdivision (a) of this rule shall, except as provided in paragraph (2) of this subdivision, issue a citation to appear before a judicial officer in lieu of arrest.");

Va. Code Ann. § 19.2-81 (Michie 1995 & Supp. 1999) (authorizing warrantless arrest of "any person who commits any crime in the presence of [an] officer");

Wash. Rev. Code Ann. § 10.31.100 (West 1990 & Supp. 1999), as amended by 2000 Wash. Laws 119 (authorizing warrantless arrests for misdemeanors committed in the presence of the officer);

W. Va. Code § 62-10-9 (2000) (authorizing warrantless arrests "for all violations of any of the criminal laws of the United States, or of this state, when committed in [an officer's] presence");

Wis. Stat. Ann. § 968.07(1)(D) (West 1998) (authorizing warrantless arrest when "[t]here are reasonable grounds to

believe that the person is committing or has committed a crime");

Wyo. Stat. Ann. § 7-2-102(b)(i) (Michie 1999) (authorizing warrantless arrest when "[a]ny criminal offense" is committed "in the officer's presence").

APPENDIX C

State-Law Limitations on Arrests for Traffic Offenses

The following States require the issuance of a citation in lieu of arrest in some circumstances:

Ala. Code § 32-1-4 (1999) (when any person is arrested for a motor vehicle misdemeanor, the officer shall release upon written bond to appear, unless officer has good cause to believe person has committed any felony, or person charged with offense resulting in injury or death or offense of DWI);

Alaska Stat. § 12.25.180(b) (Michie 1998) (when person is stopped for the commission of a misdemeanor or the violation of a municipal ordinance, person shall be issued citation unless satisfactory evidence of identity not furnished or person refuses to accept citation or give written promise to appear);

Ark. Code Ann. § 27-14-405 (Michie 1994) (authorizing arrests upon view and without warrant for any violation committed in their presence of laws regulating the operation of vehicles or the use of the highways); *id.* § 27-50-601 (procedure prescribed shall not otherwise be exclusive of any other method prescribed by law for the arrest and prosecution of a person for an offense of like grade.); *id.* § 27-50-603 (providing for release from custody for traffic offenses on written promise to appear);

Cal. Veh. Code § 40504 (West 1985 & Supp. 2000) (officer must deliver copy of notice to appear to arrested person;

upon promise to appear and identification, the arresting officer shall release the person arrested from custody);

Colo. Rev. Stat. § 42-4-1707 (1999) (for violation of vehicle code punishable as a misdemeanor, petty offense, or misdemeanor traffic offense, other than a violation for which a penalty assessment notice may be issued, officer may issue and serve upon the defendant a summons and complaint); *id.* § 42-4-1712 (provisions of vehicle code shall govern all police officers in making arrests without a warrant or issuing citations for violations of vehicle code, for offenses or infractions committed in their presence, but the procedure prescribed in this article shall not otherwise be exclusive of any other method prescribed by law for the arrest and prosecution of a person for an offense or infraction of like grade);

Fla. Stat. Ann. § 901.15 (West 1996 & Supp. 2000) (authorizing warrantless arrest for misdemeanor committed or ordinance violated in presence of officer); *id.* § 321.05(3)(a) (highway patrol has authority to make arrests while in fresh pursuit of a person believed to have violated the traffic laws); *id.* § 318.14 (specifying that police must issue a citation in lieu of arrest for certain noncriminal traffic infractions);

Haw. Rev. Stat. Ann. § 286-10 (Michie 1998) (upon arresting a person for violation of any provision of the code, officer shall issue to the alleged violator a summons or citation);

Ky. Rev. Stat. Ann. § 431.015(2) (Michie 1999), § 189.290(1) (Michie 1997) (officer must issue citation rather than arrest for certain motor vehicle violations, but exceptions include any one who fails to operate his or her vehicle in a "careful manner, with regard for the safety and convenience of pedestrians and other vehicles upon the highway");

La. Rev. Stat. Ann. § 32:391 (West 1989) (officer shall release on promise to appear person arrested for motor vehicle violation, except in certain situations, for example, if officer has good cause to believe person committed any felony or misdemeanor);

Md. Code Ann. Transp. II § 26-202(a)(2) (1998) (authorizing officer to arrest without warrant for any traffic law violation only if violation committed within officer's presence and person does not furnish satisfactory proof of identify or officer reasonably believes traffic citation will be ignored or in other specified circumstances);

Mich. Comp. Laws Ann. § 764.15(1)(a) (West 2000) (authorizing arrest without a warrant for misdemeanor, or ordinance violation committed in the officer's presence); but see *id.* § 257.907 (West 1990 & Supp. 2000) (certain traffic offenses are civil infractions);

Minn. Stat. Ann. § 169.91 (West 1986 & Supp. 2000) (officer shall issue written notice to appear to person arrested for motor vehicle violation, but must bring person before judge in certain instances, for example, when there is reasonable cause to believe person will leave state);

Neb. Rev. Stat. Ann. §§ 29-427, 29-432, 29-435, 60-684 (Michie 1995) (officer shall issue citation in lieu of arrest for traffic infraction, but can arrest and detain person if, for example, officer believes person will not appear, or will cause immediate harm if not detained, or person has no ties to community);

N.M. Stat. Ann. § 66-2-12(A)(2) (Michie 1998) (authorizing warrantless arrests for motor vehicle code violations committed in the presence of the officer); *id.* § 66-8-123 (officer

must issue summons in lieu of arrest for traffic offense with five exceptions);

N.D. Cent. Code § 39-07-07 (1987 & Supp. 1997) (requires the issuance of a summons in lieu of arrest with some exceptions);

Ohio Rev. Code Ann. § 2935.03 (Anderson 1999) (warrantless arrest allowed if violated state law, municipal ordinance, or township resolution in presence of officer and in jurisdiction in which the officer is appointed, employed, or elected); *id.* § 2935.26 ("Notwithstanding any other provision of the Revised Code, when a law enforcement officer is otherwise authorized to arrest a person for the commission of a minor misdemeanor, the officer shall not arrest the person, but shall issue a citation," unless certain circumstances apply);

Okla. Stat. Ann. tit. 22, § 1115.1(A) (West Supp. 2000) (officer shall release on personal recognizance person arrested solely for misdemeanor traffic violation if, among other requirements, officer is satisfied as to person's identify);

Or. Rev. Stat. §§ 133.310(1) (1990 & Supp. 1998), 810.410 (1995 & Supp. 1998) (officer shall not arrest person who commits traffic infraction and may issue citation instead; however, officer can arrest person for specified offense, for example, reckless driving);

R.I. Gen. Laws § 12-7-3 (1994) (warrantless arrest allowed when officer has probable cause to believe misdemeanor committed in his presence and probable cause to believe person to be arrested committed the offense); *id.* § 11-1-2 (offense punishable by fine of not more than $500 is a violation only);

S.C. Code Ann. § 56-25-30 (Law. Co-op. 1991) (officer may release person on own recognizance who has accepted a traffic citation issued by the officer);

S.D. Codified Laws § 32-33-2 (Michie 1998) (citation required whenever violation punishable as misdemeanor);

Tenn. Code Ann. § 40-7-118(b)(1) (1997) (citation in lieu of continued custody for misdemeanor offenses);

Vt. R. Crim. P. 3(a), (c) (officer who has grounds to arrest person for misdemeanor shall issue citation in lieu of arrest, but may arrest in certain specified instances, for example, if person fails to furnish adequate proof of identity, arrest is necessary to obtain nontestimonial evidence, or person has insufficient ties to community);

Va. Code Ann. § 46.2-936 (Michie 1998 & Supp. 1999) (for misdemeanor traffic violations, officer shall issue a summons in lieu of arrest);

Wash. Rev. Code Ann. § 46.64.015 (West 1987 & Supp. 1999) (officer must issue citation in lieu of arrest for traffic offenses except in certain circumstances); *id.* 10.31.100(3) (West 1990 & Supp. 1999) (authorizing warrantless arrests for certain traffic infractions)

Wis. Stat. Ann. §§ 345.22, 345.23 (West 1999) (officer shall release traffic-regulation violator arrested without warrant under certain conditions; otherwise officer has discretion to take violator into custody).

The following States put no statutory limits on police discretion to arrest for traffic offenses:

Ariz. Rev. Stat. Ann. § 13-3883(B) (West Supp. 1999) (officer may stop and detain a person as is reasonably necessary to investigate an actual or suspected violation of any traffic law committed in the officer's presence);

Conn. Gen. Stat. Ann. § 54-1f(a) (West 1994 & Supp. 2000) (officer may arrest in his precinct for any offense when person taken while committing offense and arrest made upon speedy information of others);

Del. Code Ann. tit. 21, § 701 (1995), as amended by 2000 Delaware Laws Ch. 325 (West) (authorizing warrantless arrest for motor vehicle violations when officer has probable cause to believe violation committed in his presence and probable cause to believe person to be arrested committed the offense);

D.C. Code Ann. § 23-581(a)(1)(B) (1996) (authorizing warrantless arrest where officer has probable cause to believe offense committed in the officer's presence);

Ga. Code Ann. § 17-4-23 (1997) (officer has discretion to give citation or arrest for violation of motor vehicle laws);

Idaho Code § 49-1407 (1994) (officer who stops someone for traffic violation has discretion to give a traffic citation or take arrestee without unnecessary delay before the proper magistrate as specified); *id.* § 19-701A (1997) (officer in fresh pursuit of a person who is reasonably believed by him to have committed, or attempted to commit, any criminal offense or traffic infraction in the presence of the officer,

shall have authority to pursue, arrest and hold in custody or cite such person anywhere in this state);

Ind. Code Ann. §§ 9-26-8-1, 9-26-8-2, 9-30-6-3 (Michie 1997), § 35-33-1-1(a)(3) (Michie 1998) (providing that the procedure prescribed in the motor vehicle chapter is not the exclusive method for the arrest and prosecution of a person for a similar offense; specifying certain offenses under the vehicle code for which officer may arrest without a warrant); *id.* § 9-30-2-5(a) (Michie 1997) (state resident arrested for a misdemeanor regulating the use and operation of motor vehicles, other than the misdemeanor of operating a vehicle while intoxicated, and not immediately taken to court shall be released from custody by the arresting officer upon signing a written promise to appear in the proper court at a time and date indicated on the promise);

Iowa Code Ann. § 804.7 (West 1994) (authorizing arrest for an offense committed in officer's presence or where officer has reasonable grounds to believe a public offense was committed);

Kan. Stat. Ann. §§ 8-2104 (1991), 8-2106 (1991 & Supp. 1999) (officer has discretion to arrest or issue citation for misdemeanor motor vehicle offenses);

Mass. Ann. Laws ch. 90, § 21 (Law. Co-op. 1994) (officer may arrest without warrant and keep in custody for not longer than 24 hours, persons who commit certain motor vehicle offenses);

Miss. Code Ann. § 27-19-133 (1999) (authorizing warrantless arrests for operating any motor vehicle contrary to the provisions of the vehicle code; if vehicle operator is taken into custody, he is entitled to an immediate hearing or to be

released from custody upon giving a good and sufficient bond to appear and answer for the violation);

Mo. Ann. Stat. § 43.195 (West 1992) (state highway patrol may arrest on view, and without a warrant, any person the officer sees violating or who has reasonable grounds to believe has violated any state motor vehicle law);

Mont. Code Ann. § 46-6-311 (1997) (officer may arrest a person when a warrant has not been issued if the officer has probable cause to believe that the person is committing an offense or that the person has committed an offense and existing circumstances require immediate arrest);

Nev. Rev. Stat. Ann. § 484.795 (Michie 1998) (officer who stops someone for a violation of certain traffic laws must bring the arrestee before a magistrate; for other traffic violations, officer has discretion to give a traffic citation or to take arrestee without unnecessary delay before the proper magistrate);

N.H. Rev. Stat. Ann. § 614:7 (1986 & Supp. 1999) (authorizing officer in fresh pursuit of a person who has violated any motor vehicle statute in the presence of the officer to arrest and hold in custody the person anywhere in this state);

N.J. Stat. Ann. § 39:5-25 (West 1990 & Supp. 2000) (officer may arrest without warrant any person committing motor vehicle violation in officer's presence, and may issue summons instead of arresting);

N.Y. Crim. Proc. Law § 140.10 (McKinney 1992) (warrantless arrest allowed when officer has probable cause to believe any offense has been committed in his presence and probable cause to believe person to be arrested committed the

offense; in the case of petty offenses, arrest within the geographical area of such officer's employment and must be made in the county in which such offense was committed or believed to have been committed or in an adjoining county); N.Y. Veh. & Traf. Law § 155 (McKinney 1996) ("For purposes of arrest without a warrant, pursuant to article one hundred forty of the criminal procedure law, a traffic infraction shall be deemed an offense.");

N.C. Gen. Stat. § 20-183(a) (1999) (officer has power to arrest on sight any person found violating motor vehicle laws);

Pa. Stat. Ann. tit. 71, § 252 (West 1990); 75 Pa. Cons. Stat. Ann. § 6304 (West 1996) (state police officer may arrest anyone, and any other police officer may arrest nonresident, for any violation of vehicle code committed in presence);

Tex. Transp. Code Ann. § 543.001 (West 1999) (any officer may arrest without warrant a person found committing a violation of the rules of the road subtitle of the vehicle code);

Utah Code Ann. § 41-3-105(8)(a) (1998 & Supp. 2000) (officers have authority to make arrests upon view and without warrant for any violation committed in their presence of any of the provisions of the motor vehicles law);

W. Va. Code § 15-5-18 (2000) (warrantless arrest allowed for misdemeanor or ordinance violation in presence of officer);

Wyo. Stat. Ann. §§ 31-5-1204 to 31-5-1205 (Michie 1999) (officer may arrest upon reasonable and probable grounds to believe person has committed certain specified motor vehicle violations, including reckless driving).